

JAMES J. HAAS

AZ State Bar No. 012162

PHILIP O. BEATTY

AZ State Bar No. 027295

ASHLEY MEYER

AZ State Bar No. 29838

LAW OFFICE OF THE PUBLIC DEFENDER

620 West Jackson, Ste 4015

Phoenix, Arizona 85003-2324

(602) 506-7711

haas@mail.maricopa.gov

beattyp@mail.maricopa.gov

meyera002@mail.maricopa.gov

IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND)

RULE 15.1(j) OF THE)

ARIZONA RULES OF)

CRIMINAL PROCEDURE)

Supreme Court No. R-16-0035

(Expedited repeal requested)

COMMENT IN OPPOSITION

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the Maricopa County Public Defender's Office ("MCPD") respectfully submits this comment to the Petition to Amend Rule 15.1(j) of the Arizona Rules of Criminal Procedure filed by David K. Byers, Administrative Director, Administrative Office of the Courts ("AOC"). As explained below, the MCPD strongly opposes the proposed rule change (the "amended Rule") because it interferes with due process, is unnecessary, and will do more to harm the victims it purportedly is supposed to

protect. The MCPD requests that the prior Rule (“prior Rule”) be reinstated immediately.

MCPD is the largest indigent defense law firm in the State of Arizona and handles a majority of all felonies including sex related cases in Maricopa County. MCPD is joined in its opposition by the Arizona Attorneys for Criminal Justice (“AACJ”). AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens’ rights, the criminal justice system and the role of the defense lawyer.

I. It is Unclear What Legal Authority the AOC is Relying Upon for Instituting Impediments to Disclosure of Critical Evidence.

Although the AOC’s Petition appears to be based in part on victims’ rights, it is not clear if it is the AOC’s position that the amended Rule is intended to comply with a statutory requirement arising separately out of A.R.S. § 13-1425. AOC Petition at Part III (amended Rule is requested “to make Rule 15.1 consistent with A.R.S. § 13-1425.”). There is nothing in A.R.S. § 13-1425 that would require this change to discovery practices. Indeed, there is no language in the statute that directly influences discovery at all.

A. Arizona Revised Statute § 13-1425 Does Not Create Criminal Liability for Images Used in Legal Proceedings and Requires No Change in Discovery Practices.

If it is the AOC's position that because A.R.S. § 13-1425 proscribes disclosure of an image under certain circumstances, then that proscription also applies to prosecutors and defense attorneys, the AOC's position is misguided. That same argument was previously advanced by the State—and summarily rejected by the Arizona Court of Appeals—in the context of possession of child pornography:

The State's final argument is that A.R.S. § 13-3553 does not provide any immunity to defense counsel for his possession of the materials. We reject that argument as unpersuasive and inconsistent with the purpose of section 13-3553 to the extent that defense counsel uses the material solely for purposes of defending this case. Arizona's child pornography laws were not aimed at prohibiting defense counsel from preparing for trial, but to prohibit the spread of child pornography.

...

Accepting the State's argument would require this Court to hold that because section 13-3553 does not provide any immunity for law enforcement officials, police possession of contraband, be it drugs or child pornography, would be illegal. Similarly, the State's showing of the pornography at trial and even this Court's receipt and possession of the pornographic materials on appeal would be illegal. Provided that defense counsel, like the police, prosecutors and court personnel use the material solely for their investigation, prosecution, defense and resolution of the case at hand, neither their possession of it nor the State's copying of it solely for such purposes should expose them to criminal liability.

Cervantes v. Cates, 206 Ariz. 178, 185–86, ¶¶ 29–30 (App. 2003). Therefore, it follows that possession and/or distribution in the context of what is necessary to prosecute or defend a case pursuant to A.R.S. § 13-1425 does not expose the prosecutor or defense attorney to criminal liability. Moreover, even the express language of A.R.S. § 13-1425 exempts “[l]awful and common practices of law enforcement, criminal reporting, legal proceedings, or medical treatment.” A.R.S. § 13-1425(B)(2) (emphasis added). Accordingly, criminal liability for possessing the subject materials is not a valid legal basis to impose additional restrictions under Rule 15.1(j).

B. There Are No Protections in the Rules of Criminal Procedure for Similar Conduct Under 2006 Voyeurism Statute.

Further puzzling is the AOC’s conflicting position given that the voyeurism statute proscribes nearly the same conduct as A.R.S. § 13-1425(A), yet there are no Rule 15.1(j) restrictions in place:

A. It is unlawful to knowingly invade the privacy of another person without the knowledge of the other person for the purpose of sexual stimulation.

B. It is unlawful for a person to disclose, display, distribute or publish a photograph, videotape, film or digital recording that is made in violation of subsection A of this section without the consent or knowledge of the person depicted.

C. For the purposes of this section, a person’s privacy is invaded if both of the following apply:

1. The person has a reasonable expectation that the person will not be photographed, videotaped, filmed, digitally recorded or otherwise viewed or recorded.
2. The person is photographed, videotaped, filmed, digitally recorded or otherwise viewed, with or without a device, either:
 - (a) While the person is in a state of undress or partial dress.
 - (b) While the person is engaged in sexual intercourse or sexual contact.
 - (c) While the person is urinating or defecating.
 - (d) In a manner that directly or indirectly captures or allows the viewing of the person's genitalia, buttock or female breast, whether clothed or unclothed, that is not otherwise visible to the public.

A.R.S. § 13-1424(A)–(C) (emphasis added). The AOC's position to impose restrictions for newly enacted A.R.S. § 13-1425 when no such restrictions have been in place for the 2006 voyeurism statute—which proscribes more invasive behavior—is inconsistent. It is nonsensical for the distribution of images taken with the consent of the victim to be subject to disclosure restrictions, while those taken without the consent of the victim are not.¹ There is no evidence to suggest that anything has changed in the decade since the 2006 enactment of the voyeurism statute that justifies creating disclosure impediments to evidence obtained in

¹ The MCPD and AACJ recognize that raising this argument could result in the AOC petitioning to modify Rule 15.1(j) to include handling of images under A.R.S. 13-1424. Should the AOC petition to include A.R.S. § 13-1424 under the control of Rule 15.1(j), this all but concedes the argument of MCPD/AACJ that the adoption of the amended Rule is the precursor to restrictions on handling any evidence that depicts the victim. *See infra* Part II.B.

prosecutions of either A.R.S. §§ 13-1424 or -1425, and accordingly, the Petition should be denied.

II. Child Victims of Sexual Exploitation in Contraband Images Differ Markedly from Consenting Adults in Legal Images.

As to the victims' rights concerns, the AOC seeks to restrict access to the most important evidence in a prosecution under A.R.S. § 13-1425(A), which bears little in common to the child pornography at issue under Title 13, Chapter 35.1. The governmental concerns in protecting child victims of sexual exploitation are far more compelling than the adult victims who ostensibly consented to the recording and/or original distribution of those images in which they are depicted.

In no way diminishing the harm that befalls victims of A.R.S. § 13-1425, the adult victims affected by this statute differ markedly from the vulnerable child victims who are, without exception, being sexually abused in child pornography, and re-abused each time those images are viewed for sexual gratification. In fashioning law related to child pornography at the federal level, the U.S. Congress found that "every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse." Adam Walsh Child Protection and Safety Act of 2006, Section 501(2)(D).

Additionally, the statutory punishments for sexual exploitation of minors are severe. In Maricopa County, the State usually charges a defendant in the "typical" child pornography case for possession of ten images/videos found on the

defendant's electronic media. The sentencing under A.R.S. § 13-705 requires that each image be sentenced consecutively to another image for 10 to 24 years per image. As a result, the defendant faces between 100 and 240 years in prison, flat time, even for first time offenders. Thus, the seriousness of the penalties in a sexual exploitation case speaks legions as to the legislature's attitude towards the seriousness of the crime.

By contrast, the proscribed conduct under A.R.S. § 13-1425(A) involves the distribution beyond the original grant of authority to distribute with "the intent to harm, harass, intimidate, threaten or coerce the depicted person." A.R.S. § 13-1425(A)(3). In prosecutions under this statute, the victim ostensibly consented not only to the underlying act or nudity but also consented to the recording. Indeed, in many cases tried under § 13-1425, it is likely that the victim created the image or video themselves and distributed it to the defendant. Moreover, a first time offender under A.R.S. § 13-1425 is probation eligible. Again, not to diminish the affect upon victims in an A.R.S. § 13-1425 prosecution, it is clear that the victim issues are vastly different from those involving the sexual exploitation of children under Title 13, Chapter 35.1. Thus, the reasons underlying the creation of Rule 15.1(j) are not present for A.R.S. § 13-1425 and the amended Rule must be repealed.

A. The Amended Rule does More Harm than Help to Victims of A.R.S. § 13-1425.

Under the amended Rule, the defense must litigate access to the materials for both himself and his client which delays a speedy resolution of the case. Not only does this delay interfere with the defendant's right to a speedy trial, but this also directly harms the victim. Ariz. Const. art. II § 2.1(10). This is because a victim likely has more involvement in the prosecution of the case under A.R.S. § 13-1425 as compared to the child victims in sexual exploitation under Chapter 35.1 who typically are not needed to testify at trial.

Under the sexual exploitation statute, the State need only prove that the defendant knowingly engaged in any proscribed acts involving the images or videos at issue. *See* A.R.S. § 13-3553. By way of background, in child pornography cases, the State is usually able to present alternative forms of evidence at trial that the images depict "real" (meaning not virtual) people and that those depicted individuals are under the age of 18 (or 15 years of age or younger, if charged under A.R.S. § 13-705), without the need for the victim to be present for those elements. Because there are no victim expectation or consent issues that the State must confront in a sexual exploitation case, these cases typically proceed without the need for the victim to testify at trial at all.

By contrast, under A.R.S. § 13-1425, there is a high likelihood that the victim will testify at the trial. The State must establish that the victim had a

reasonable expectation of privacy. Additionally, consent is a statutory defense that will likely be raised. For these reasons, a victim is very likely to testify in a prosecution under A.R.S. § 13-1425. Thus, the amended Rule foists more hearings, delays and the lingering anticipation of testifying at trial upon the very victims it purportedly is designed to protect.

B. Adopting the Amended Rule is the Precursor to Restricting Access to Crime Scene Photos, Autopsies and Other Victim Evidence.

If the amended Rule—restricting access to images of consenting adults presumably taken with permission of the parties—is permitted to stand, then little stands in the way to stop expansion of Rule 15.1(j) to include any evidence that depicts the victim in the slightest of unflattering circumstances. Presumably, the dignity of the victim is assailed in gruesome crime scene photos, autopsy images, examination photos performed by a sexual assault nurse examiner (“SANE exams”) and, arguably, virtually any other depiction of the victim related to the commission of a crime. Rule 15.1(j) was designed to be a very narrow and limited exception applying to the extremely sensitive and harmful area of sexual exploitation of children. The amended Rule is unnecessary and begins the erosion of Arizona’s discovery rules that are designed to ensure a fundamentally fair and speedy trial.

III. The Amended Rule Abrogates the Individualized Determination Provided by Rules 15.4(d) and 15.5(b).

The Rules of Criminal Procedure already provide the proper balance between due process and victim's rights. First, Rule 15.4(d) dictates that "[a]ny materials furnished to an attorney pursuant to this rule shall not be disclosed to the public but only to others to the extent necessary for the proper conduct of the case." Rule 15.4(d) (emphasis added). Violation of this rule would subject the attorney to possible sanctions and/or criminal prosecution for engaging in the proscribed conduct connected with the possession and/or distribution of the evidence. Thus, Rule 15.4(d) already protects the evidence from improper disclosure, and essentially puts the attorney on the "hot seat" should he or she improperly disclose it further.

Additionally, Rule 15.5(b) already provides the mechanism for further restrictions as is necessary under an individualized determination under the sound discretion of a judicial officer. Given the broad range of individualized circumstances that fall under A.R.S. § 13-1425, restrictions should be imposed on an individualized basis rather than the "one-size-fits-all" approach of the amended Rule.

By contrast, the amended Rule overrides the express protections of Rule 15.4(d) and flexibility of Rule 15.5(b) and imposes a "one-size-fits-all" mechanism that is not individualized to the needs of the case. Under the amended Rule, the

defense must always litigate access to the materials. If the defense is using an expert to review the evidence, they must disclose the identity of various experts to the State. Under the amended Rule, the images will still be viewed by the same individuals (state, defense, experts, jury, judge, etc) as would view them otherwise, so the amended Rule adds no real value to victims' rights while impeding defense of the case and hurting the victim.

IV. Conclusion

As explained above, no suitable legal basis exists for the amended Rule. The victims' rights issues of tremendously abused child victims in a child pornography case are inapposite to the consenting adults under A.R.S. § 13-1425. The amended Rule impedes access to critical evidence and, in fact, harms victims by imposing additional delays in cases, compromises due process and begins the journey of restricting access to the most basic of critical evidence. Rules 15.4 and 15.5(b) already provide adequate protections and mechanisms for the handling of sensitive evidence, and maintain the proper approach to restrictions: an individualized determination as opposed to a blanket "one-size-fits-all" approach under the amended Rule.

RESPECTFULLY SUBMITTED this 21 day of September, 2016.

By: /s/ James J. Haas
JAMES J. HAAS
Attorney At Law

/s/ Philip O. Beatty
PHILIP O. BEATTY
Attorney At Law

/s/ Ashley Meyer
ASHLEY MEYER
Attorney At Law
LAW OFFICE OF THE PUBLIC DEFENDER

/s/ David Euchner
DAVID EUCHNER
Attorney at Law
ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE